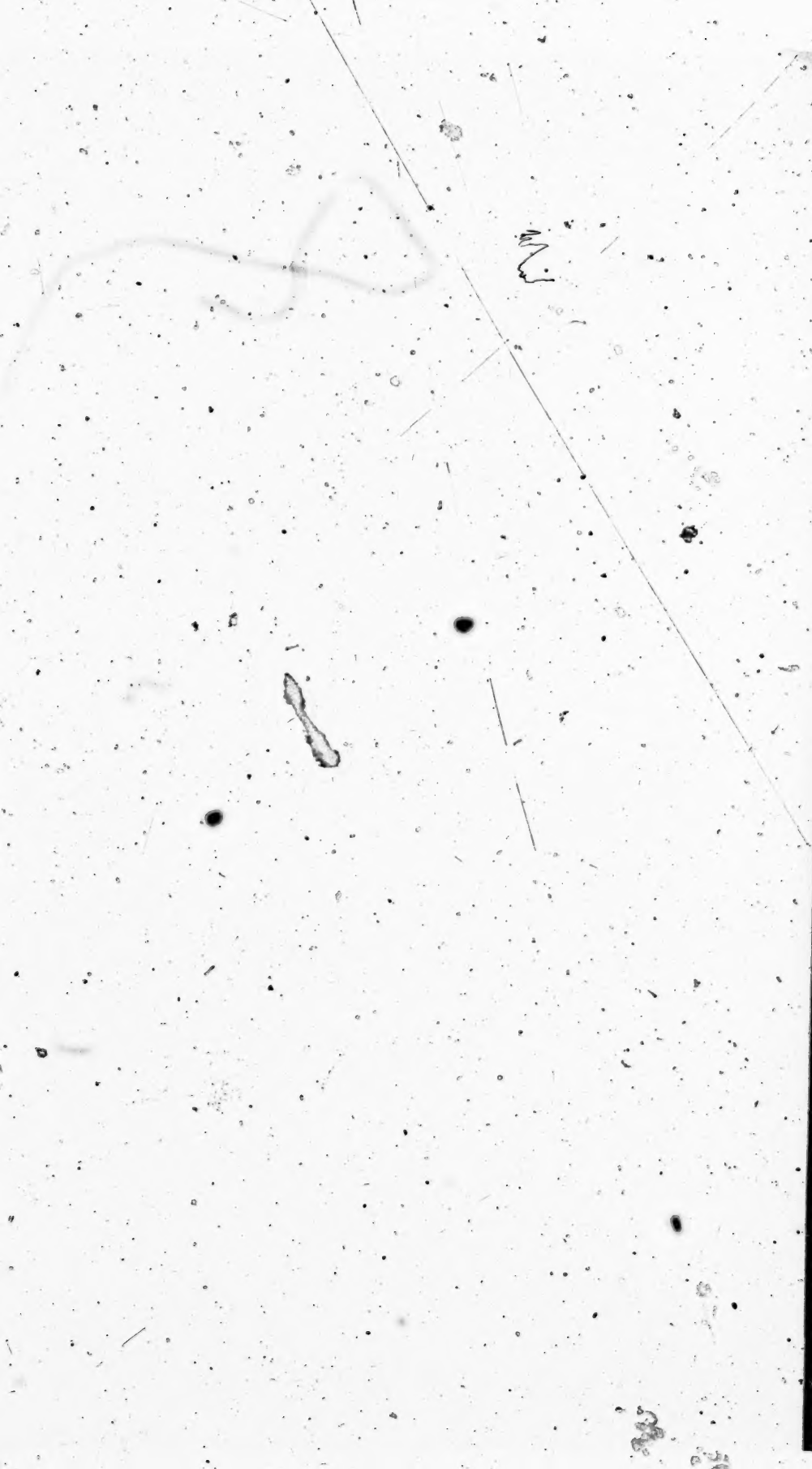

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 5

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF FRANCOIS L. CHURCH, Deceased,
EDWARD E. BLACK, Executor,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT ON REARGUMENT

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BRIEF FOR THE RESPONDENT ON REARGUMENT

Statement

This brief is filed pursuant to order of this Court, dated June 21, 1948, directing reargument of this and the companion *Spiegel* case and requesting counsel to discuss particularly certain questions propounded by the Court in so far as they are relevant to the respective cases (Supreme Court Journal, pp. 296-298). The usual statements concerning opinions below, the jurisdiction and the facts are omitted here inasmuch as they are set forth in the brief for respondent which was filed at the time of the first argument. The statute

involved is section 811(c) of the Internal Revenue Code. It and all its predecessors are set forth in Appendix A of this brief. The regulation involved and all its predecessors are set forth in Appendix B.

Questions Presented

The questions propounded by the Court are as follows:

1. Assuming that, under the applicable state law, there was no possibility of reverter and no interest of any other kind retained or arising in favor of the settlor or his estate under the transfer made in trust, *inter vivos*, did section 811(c) of the Internal Revenue Code require that the value of the corpus of the trust be included in the settlor's gross estate for federal estate-tax purposes? That is, did section 811(c) require the inclusion in the gross estate of the settlor of the value of the corpus of a trust, created *inter vivos*, merely because the settlor had provided in it that, upon his death, the trust should terminate and the corpus be distributed to designated beneficiaries then surviving?

2. Assuming that, under the applicable state law, there arose, by operation of law, a possible reverter in favor of the settlor's estate, did section 811(c) require that the value of the corpus, in view of the record in the case, be included in the settlor's gross estate for federal estate-tax purposes?

3. Did section 811(c) of the Internal Revenue Code, in 1939, require the inclusion in the settlor's gross estate of the value of the corpus of a trust because the settlor, by its terms, had, in 1924, reserved to himself a right to the

income of the trust until his death, the reservation thus being made before the March 3, 1931, amendment of that section?

4. Were the joint congressional resolution of 1931 (46 Stat. 1516-1517), and subsequent related estate-tax statutes, intended to be a repudiation of this Court's *May* v. *Heiner* (281 U. S. 238) interpretation of the estate-tax statutes?

5. Did the *May* v. *Heiner* estate-tax interpretation survive the congressional resolution and this Court's holding and opinion in *Helvering* v. *Hallock* (309 U. S. 106)?

6. Under section 811(c) is the "possession and enjoyment" of the corpus of an *inter vivos* trust "intended to take effect * * * at or after" the settlor's death, where he names himself as cotrustee with the broad control and administrative powers over the corpus and income here vested, and where the corpus is withheld from the beneficiaries until the settlor's death?

7. In the light of this Court's opinion in *Helvering* v. *Hallock* does the *Hassett* v. *Welch* (303 U. S. 303) interpretation of the 1931 congressional resolution have controlling relevance in determining whether the estate tax shall be applied to the Church properties transferred to beneficiaries under a trust created before 1931 but in which Church retained the net income from the trust properties during his life?

8. Assuming that under the "refined technicalities of the law of property" the "possession and enjoyment" of the trust properties here be deemed to have passed to the beneficiaries when the trust was created, are the transfers so

much "akin to testamentary dispositions" as to make them subject to the estate-tax statutes? (See *Helvering* v. *Hallock*, p. 112.)

9. What is the effect of the rulings of *Helvering* v. *Clifford* (309 U. S. 331) upon these trusts?

Outline of Argument

The first question assumes that the settlor retained no interest of any kind. Inasmuch as Mr. Church retained a life estate, the assumption is inapplicable to this case and is presumably intended to apply only to the *Spiegel* case. Respondent will therefore omit any discussion of the first question.

While possibly some of the other questions are directed only to the *Spiegel* case, that is not clear, and respondent will therefore discuss all questions except the first. Respondent will urge that all eight questions be answered in the negative. The following table indicates where the discussion of the particular questions is to be found in this brief:

Question	
1	Not discussed
2	Point 1
3	Point 2
4	Subdivision (b) of Point 2
5	Subdivisions (b) and (c) of Point 2
6	Point 3
7	Subdivision (c) of Point 2
8	Point 4
9	Point 5

While it would appear that by propounding the questions a majority of this Court may have already determined that it will apply neither the *Dobson* rule nor the rule that an appellant may not raise new points of law in this Court, respondent will nevertheless urge those rules briefly herein.

ARGUMENT

POINT 1.

ASSUMING THAT THERE AROSE, BY OPERATION OF NEW YORK LAW A POSSIBLE REVERTER IN FAVOR OF THE SETTLOR'S ESTATE, SECTION 811(c) DOES NOT REQUIRE THAT THE VALUE OF THE CORPUS, IN VIEW OF THE RECORD IN THE CASE, BE INCLUDED IN THE SETTLOR'S GROSS ESTATE FOR FEDERAL ESTATE TAX PURPOSES.

Question 2 does not appear to be concerned with anything but the legal consequences of the existence of a possibility of reverter. If the question is directed to the *Church* case at all, it must be predicated on the assumption that the Tax Court was clearly wrong in finding that Mr. Church, during his lifetime, had disposed of his interest in the corpus as well as any man could and that no interest in the property passed from Mr. Church to the remaindermen at his death (R. 10). In that event the significance of the question would appear to lie in the words "in view of the record in the case".

The record in the case shows that one of Mr. Church's older brothers urged him to go to the family attorney to place the stock in trust so that he might be in no position to dispose of it to persons outside the family circle (R. 4). The record shows that the settlor told the attorney that that was why he wanted to place the stock in trust (p. 33, typewritten transcript

of record).* The record shows that the Tax Court found that that was the settlor's motive in placing the stock in trust (R. 8). The record in the case therefore clearly establishes motive and subjective intent if they be of significance in applying the statute.

If the test is objective the record is equally clear. The possibility of reverter, if any existed, was so fantastically remote that its value was less than three ten-thousandths of a cent (R. 13).**

Respondent has pointed out, in its earlier brief before this Court, that the word "intended" in the statute should not be treated as mere surplusage and that at least it must be construed as referring to a possibility that has some basis in human experience. The record in the case, coupled with New York legal precedents as set forth in respondent's earlier brief, clearly establishes that there was not even a fantastically remote possibility of reverter. If, however, this Court thinks there was, the reverter would still be so remote as to negative the existence of any intention under a realistic objective standard. The Tax Court still adheres to a realistic standard. *Estate of Emma L. Keck*, 10 T. C. No. 144 (1948); *Lucy B. Platt Est.*, 6 T. C. M. 885 (1947).

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*It has been stipulated that either party may refer to parts of the original record on file with this Court which have not been printed. (R. 23-24).

**Petitioner has never denied before this or before either of the lower courts that respondent's actuarial valuation of the possibility of reverter, if any, was correct. At the close of the trial and again before the decision was rendered respondent asked leave to introduce the actuarial testimony but the Tax Court quite evidently deemed it unnecessary (p. 37, typewritten transcript of record; R. 10-14). If, however, this Court deems such valuation to be necessary to the decision of the case there is ample precedent for sending the case back for receipt of the proffered evidence unless petitioner is prepared to concede it. *United States* v. *Wyoming*, 331 U. S. 440, 457-460 (1947); *Hormel* v. *Helvering*, 312 U. S. 552, 560 (1941).

POINT 2.

SECTION 811(c) OF THE INTERNAL REVENUE CODE, AS IT EXISTED IN 1939, DID NOT REQUIRE THE INCLUSION IN THE SETTLOR'S GROSS ESTATE OF THE CORPUS OF THE TRUST MERELY BECAUSE THE SETTLOR HAD, IN 1924, RESERVED TO HIMSELF A RIGHT TO THE INCOME OF THE TRUST UNTIL HIS DEATH.

Question 3 asks whether section 811(c) of the Internal Revenue Code requires the inclusion of the corpus of the trust in the gross estate because of the settlor's reservation of the life income. Questions 4, 5 and 7 are devoted to subordinate elements of the same question. Respondent will therefore answer all four questions under this single point by urging that *May* v. *Heiner*, 281 U. S. 238 (1930), should be followed in the absence of legislation abrogating it, that the amendments to the earlier counterpart of section 811(c) which were made by the Joint Resolution of March 3, 1931 and subsequent related enactments were not intended to abrogate *May* v. *Heiner* as to trusts created before March 3, 1931 and that *Helvering* v. *Hallock*, 309 U. S. 106 (1940), should not be deemed to be a repudiation of *Hassett* v. *Welch*, 303 U. S. 303 (1938).

(a) *May* v. *Heiner* should be followed in the absence of legislation abrogating it.

The Church trust was established in 1924 and Mr. Church died in 1939. The trust involved in *May* v. *Heiner* had been established in 1917 and the settlor had died in 1920. Both trusts had therefore been created after the enactment of the first estate tax law. In *May* v. *Heiner* the settlor had granted the life income to her husband and then to herself after her husband's death, with remainder to her four children, their

distributees or appointees. This Court held, on the authority of *Nichols* v. *Coolidge*, 274 U. S. 531 (1927) and *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339 (1929), that it was at least doubtful whether Congress intended, by section 402(c) of the Revenue Act of 1918, to tax the corpus when the settlor had surrendered all power of disposition of the corpus long before her death. The court quoted from its language in *Reinecke* v. *Northern Trust Co.* to the effect that "That doubt must be resolved in favor of the taxpayer * * *" (281 U. S. 238, 245).

The decision in *May* v. *Heiner* was unanimous on the part of the then eight members of this Court. Approximately eleven months later the same court, with the addition of Mr. Justice Roberts who had been appointed by reason of the vacancy created by the death of Mr. Justice Sanford, unanimously applied the rule of *May* v. *Heiner* in a series of three cases which raised the same question. *Burnet* v. *Northern Trust Co.*, 283 U. S. 782 (1931); *Morsman* v. *Burnet*, 283 U. S. 783 (1931); and *McCormick* v. *Burnet*, 283 U. S. 784 (1931). Those cases arose under sections 402(c) of the Revenue Act of 1921 (*Northern Trust Co.* and *McCormick*) and 302(c) of the Revenue Act of 1924 (*Morsman*).

Respondent does not take the position that the language of the statute as it existed before March 3, 1931 necessarily dictated the construction which was placed upon it by this Court in those four cases. For eighteen years legal scholars have discussed that proposition, with varying conclusions.*

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*Knouff, *Death Taxes on Completed Transfers Inter Vivos*, 36 Mich. L. Rev. 1284, 1301 (1938); Rottschaefer, *Taxation of Transfers Taking Effect in Possession at Grantor's Death*, 26 Iowa L. Rev. 514, 516 (1941); Surrey and Aronson, *Inter Vivos Transfers and the Federal Estate Tax*, 32 Col. L. Rev. 1332, 1338 (1932); Lowndes, Tax

There was at the time no ascertainable congressional intent. Prior to *May* v. *Heiner* there had been decisions in the courts of six states which dealt with irrevocable *inter vivos* trusts and held that similar language in the state statutes required the imposition of the tax upon the coming into enjoyment of the corpus of the trust at the termination of the settlor's reserved life estate.* But the state death duties were inheritance or legacy taxes—that is, taxes measured by the interests to which living persons succeeded by reason of the death of the donor. The modern federal death duty, on the other hand, which commenced with the Revenue Act of 1916, was, at least until March 3, 1931, considered to be only an estate tax—that is, a tax measured by property which passed from the decedent at

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Avoidance and the Federal Estate Tax, 7 Law & Contemp. Prob. 309, 314 (1940); Eisenstein, *Estate Taxes and the Higher Learning of the Supreme Court*, 3 Tax L. Rev. 395, 449 (1948).

*Forty-two of the forty-eight states had inheritance tax laws in the form of a tax on the right of succession which were effective in or prior to 1916, H. R. Rep. No. 922, 64th Cong., 1st Sess. (1916), 1939-1 Cum. Bull. (Part 2) 22, 25. Forty state statutes were listed in the petitioner's brief, page 20, in this Court in the case of *Hassett* v. *Welch*, 303 U. S. 303 (1938), as containing the phrase "intended to take effect in possession or enjoyment at or after the death of the grantor" or similar language; to these may be added North Carolina P. L. 1915, c. 285, Sec. 6. The statutes of Louisiana, La. Laws 1904, Act No. 45, page 102, did not include the quoted clause.

The courts of the various states up to 1930 construed the phrase "intended to take effect in possession or enjoyment at or after the death of the grantor" or similar language as making irrevocable transfers in trust under which the grantor reserved a life estate taxable under these statutes to the remaindermen with respect to the shares which they received. *The People* v. *Northern Trust Co.*, 330 Ill. 238, 161 N. E. 525 (1928); *In re Estate of Marshall*, 179 Minn. 233, 228 N. W. 920 (1930); *Douglas County* v. *Kountze*, 84 Neb. 506, 121 N. W. 593 (1909); *In re Miller's Estate*, 43 Nev. 45, 185 Pac. 565 (1919), aff'd without discussion of this point in 256 U. S. 222 (1921); *Carter* v. *Bugbee*, 91 N. J. L. 438, 103 Atl. 818 (1918), aff'd 92 N. J. L. 390, 106 Atl. 412 (1919); *Matter of John C. Stephan*, 121 Misc. 596 (Surr. Ct., N. Y. County, 1923).

his death and, as a protection to the revenue, by property which he had conveyed during life in order to avoid the estate tax.

The distinction between the two types of taxes had been pointed out by this Court in *Knowlton* v. *Moore*, 178 U. S. 41, 49-50 (1900), which involved the interpretation of the provisions of the War Revenue Act of 1898 (30 Stat. 448) imposing death duties. The Court construed the 1898 Act as an inheritance tax statute rather than as an estate tax statute.

With this distinction between an estate and an inheritance tax in mind Congress enacted the Revenue Act of 1916 which imposed for the first time the modern system of federal death duties (39 Stat. 777). In the report of the Committee on Ways and Means it was made abundantly clear that Congress intended to enact an estate tax law, not an inheritance or legacy tax law.* The report stated (H. R. Report No. 922, 64th Cong., 1st Sess. (1916), 1939-1 Cum. Bull. [Part 2] 22, 25):

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.
>
> "The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various States, and the

*The Treasury Department so understood it. Article IV of U. S. Treas. Reg. 37 (revised May, 1917) says, "This is not an inheritance tax, and the interests of separate beneficiaries and the manner of their taking have no bearing upon the question of liability to tax on the amount of tax due. This is a transfer tax in a lump sum resting upon the decedent's whole net estate computed according to sections 202 and 203 of the Act."

same can be readily administered with less conflict than a tax based upon the shares."

And this Court in a series of decisions recognized that Congress had enacted an estate, rather than an inheritance, tax. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921); *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50 (1924); *Edwards* v. *Slocum*, 264 U. S. 61, 62 (1924); *Nichols* v. *Coolidge*, 274 U. S. 531, 541 (1927); *Chase National Bank* v. *United States*, 278 U. S. 327, 334 (1929). As will hereinafter be demonstrated, this fact seems to have had a profound effect on the construction of the words "intended to take effect in possession or enjoyment at or after death" by this Court for more than twenty years.

The language was not new in federal legislation. Similar language is to be found in an inheritance tax law adopted by Congress in 1862 (12 Stat. 432, 485), having presumably been borrowed from the language of Pennsylvania and Maryland inheritance tax laws enacted in 1826 and 1844, respectively (Pa. Acts, 1825-6, c. 72; Md. Laws 1844-5, c. 237).* Such language had been reenacted by Congress in 1862 (12 Stat. 432, 485), again in Section 124 of the Revenue Act of 1864 (13 Stat. 223, 285), and again in 1898 (30 Stat. 448, 464), but this Court was not called upon to interpret its meaning until after 1916. When the problem finally arose, logic appeared to dictate the solution. The new death duty was an estate tax measured by what passed from the decedent by reason of death rather than by what the donees, legatees and distributees secured by reason of death. Accordingly this Court held

*Note, *Origin of the Phrase, "Intended to Take Effect in Possession or Enjoyment at or after . . . Death" (Section 811(c), Internal Revenue Code)*, 56 Yale L. J. 176 (1946).

that it was contrary to the congressional intent to include in the measure of the tax property which the decedent did not own at death except in cases where the property had been given with the purpose of avoiding the tax. *Llewellyn* v. *Frick*, 268 U. S. 238 (1925); *Shukert* v. *Allen*, 273 U. S. 545 (1927); *Nichols* v. *Coolidge*, 274 U. S. 531, *supra*; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*.

In *Llewellyn* v. *Frick*, *supra*, the Court refused to construe section 402(f) of the Revenue Act of 1918 (which became law February 24, 1919) as taxing the proceeds of insurance on the life of the decedent when the policies had been irrevocably assigned before the act was passed.

In *Shukert* v. *Allen*, *supra*, the Court refused to construe section 402(c) of the 1918 Act as applying to trust property which the decedent did not own at death, saying (p. 547):

> "The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust. See Gray, The Rule Against Perpetuities, §108(3). It seems plain from the little evidence that was put in that the testator was not acting in contemplation of death as a motive for his act, or otherwise, except in the sense that he was creating a fund intended to secure his children from want in their old age, whoever might dissipate the considerable property that he retained and left at his death; and that being fifty-six years old, if he thought about it, he would have con-

templated the possibility or probability of his being dead before the emergency might arise. Of course it was not argued that every vested interest that manifestly would take effect in actual enjoyment after the grantor's death was within the statute. There certainly is no transfer taking effect after his death to be taxed under §401."

In *Nichols* v. *Coolidge, supra,* the decedent and her husband had conveyed real and personal property to trustees in 1907, reserving a life estate and granting the remainders to their children. In 1917 they had assigned the life estate to the children. The decedent died in January 1921. The Court refused to construe section 402(c) of the 1918 Act as taxing the remainder interests merely because they came into enjoyment when she died, saying (pp. 541-542):

"Certainly, Congress may lay an excise upon the transfer of property by death reckoned upon the value of the interest which passes thereby. But under the mere guise of reaching something within its powers Congress may not lay a charge upon what is beyond them. Taxes are very real things and statutes imposing them are estimated by practical results.

* * *

"Under the theory advanced for the United States, the arbitrary, whimsical and burdensome character of the challenged tax is plain enough. An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be

no tax; if, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died See *Frew* v. *Bowers*, 12 Fed. (2d) 625."

In *Reinecke* v. *Northern Trust Co.*, *supra*, the decedent had created trusts in 1919 with life interests in others and remainders over at or after her death. She died in 1922. The Court refused to construe section 402(c) of the 1921 Act as taxing the corpus of the trusts merely because their enjoyment depended upon the termination of precedent estates the continuance of which was related to the date of death of the settlor. The Court there said (pp. 347-348):

"In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. Cf. *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50; *Edwards* v. *Slocum*, 264 U. S. 61, 62; *N. Y. Trust Co.* v. *Eisner*, 256 U. S. 345, 349. It is not a gift tax, and the tax on gifts once imposed by the Revenue Act of 1924, c. 234, 43 Stat. 313, has been repealed, 44 Stat. 126. One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

"It is of significance, although not conclusive, that the only section imposing the tax, §401, does so on the net estate of decedents, and that the miscellaneous items

of property required by §402 to be brought into the gross estate for the purpose of computing the tax, unless the present remainders be an exception, are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. They are property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death. The two sections, read together, indicate no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute and the language of §401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in §402(c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under §401. That doubt must be resolved in favor of the taxpayer."

It was to be anticipated, therefore, that when cases involving a reserved life estate arose the Court would hold that, in the absence of evidence that the gift was made in contemplation of death, the corpus of the trust would not be included in the gross estate inasmuch as it was not part of the property passing from the decedent at his death.

So when *May* v. *Heiner* and other cases involving reserved life estates came before this Court in 1930 and 1931 a unanimous court held four times that Congress did not intend to tax gifts of the corpus which had been made irrevocably before death without intent to avoid death duties. To have held

otherwise would have meant that the tax was not measured solely by what passed from the decedent at death but by what came into the possession or enjoyment of others by reason of his death.

The rationale of *May* v. *Heiner*, *Reinecke* v. *Northern Trust Co.* and similar cases discussed hereinabove continued to be followed by this Court for many years. See, for example, *Helvering* v. *Helmholz*, 296 U. S. 93 (1935), and *Hassett* v. *Welch*, 303 U. S. 303 (1938).

Respondent reiterates that it does not assert that the construction of the successive revenue acts by this Court for more than twenty years was the only construction which could properly have been placed upon them. But respondent does urge that those decisions were made by unanimous courts after able and thorough presentation of the issues by counsel for both sides, that the construction which the Court adopted was tenable and that this Court should therefore follow the precedents which it has established. *Cf. Helvering* v. *Hallock*, 309 U. S. 106, 119-121 (1940).

No constitutional issue and no issue involving the life or liberty of the individual is involved. A clearer case for the application of stare decisis can scarcely be imagined. Congress was free to change the law if it so desired. In the absence of such a change those concerned were entitled to rely upon the construction of the statute as settled and to act accordingly. An unnecessary degree of uncertainty is bound to result if the long established interpretation of the statutes is to be repudiated merely because those who now occupy the seats of judgment would now arrive at an opposite conclusion if the question were now one of first impression.

This is not to deny that upon the adoption by Congress of the Joint Resolution of March 3, 1931 it became the duty of this Court to decide whether the rule of *May* v. *Heiner* and of

the three decisions of March 2, 1931 which followed *May* v. *Heiner* had been abrogated.

(b) The Joint Resolution of March 3, 1931 and subsequent related estate tax statutes were not intended to apply to trusts created before March 3, 1931.

The subsection as amended on March 3, 1931 is set forth in Appendix A. The new matter is in italics.

The Court has asked whether the joint resolution was intended to be a repudiation of its *May* v. *Heiner* interpretation. The resolution was undeniably intended to tax trusts of the same type created in the future.* To that extent it was an expression of the will of Congress that *May* v. *Heiner* should no longer be the law. But there is no evidence that Congress intended to say that *May* v. *Heiner* never was the law or that the amendment should apply to irrevocable trusts already created.* In fact, what evidence there is, is to the contrary and, on that evidence, the seven justices who participated in the decision of *Hassett* v. *Welch* were unanimous in holding that *May* v. *Heiner* was still the law as to irrevocable trusts created before the enactment of the joint resolution. The arguments on both sides of the question were exhaustively made in the briefs in *Hassett* v. *Welch* and little further enlightenment on the subject seems to be available.

The joint resolution was enacted hurriedly by a retiring Congress. It was occasioned in part by the three unanimous decisions of this Court rendered only one day before its enactment in which the Court had affirmed and applied the rule of *May* v. *Heiner*. There were no committee reports on the

*"The contemporaneous statements of persons drafting the resolution, which perhaps should be given special weight, show pretty clearly that only a prospective operation was intended for the resolution." 1 Paul, *Federal Estate and Gift Taxation* 340 (1942).

resolution and, as far as respondent has been able to ascertain, no public hearings were held. However, a communication from the then Acting Secretary of the Treasury to the Speaker of the House of Representatives and the statements which were made on the floors of the House and the Senate by those in charge of the bill are enlightening.

In submitting the proposed joint resolution to the Speaker of the House of Representatives with the request that it be enacted, the Acting Secretary of the Treasury purported to explain the meaning of the decisions in *May* v. *Heiner*, *Burnet* v. *Northern Trust Co.* and *McCormick* v. *Burnet* and then said [74 CONG. REC. 7198 (1931)]:

> "It is believed desirable, in view of the character of these transfers and in order to prevent tax evasion, that they be included in the statute. The Treasury has, therefore, drafted a proposed joint resolution, which is inclosed, amending the statute so as to include such transfers."

It will be noted that the Treasury did not seem to be concerned with trusts created for reasons dissociated from estate tax evasion. It was concerned with the possibilities of deliberate tax evasion inherent in the creation of trusts with reserved life estates. The inference is that the Treasury felt that even where such a gift was made to evade the estate tax the representatives of the estate might succeed in convincing the courts that the gift had been made for other motives and was therefore not made in contemplation of death. The Treasury obviously wanted a statute that would eliminate the necessity for reviewing the motives behind the gift.

The same attitude is reflected in the explanation made on the floor of the House by a member of the Committee on Ways and Means who had charge of the joint resolution. MR. Hawley said (74 CONG. REC. 7198, *supra*):

> "It is entirely apparent that if this situation is permitted to continue, the Federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

It will be noted that Mr. Hawley feared that many would "proceed to execute trusts" to escape the estate tax. The tenor of his language was prospective. And when Mr. Sabath inquired as to the scope of the resolution, Mr. Hawley replied (*id.* p. 7198):

> "It provides that *hereafter* no such method shall be used to evade the tax." (Italics supplied.)

Mr. Hawley was obviously referring to trusts created in the future, for a settlor who had already established such a trust could scarcely be said to have thus used such a method "hereafter".

Immediately after the resolution was adopted by the House, Mr. Garner made a statement in explanation of the resolution which may have been intended for the enlightenment of the Senate. Among other things he said (*id.* p. 7199):

> "The Committee on Ways and Means this afternoon had a meeting and unanimously reported the resolution just passed. We did not make it retroactive for the reason that we were afraid that the Senate would not agree to it. But I do hope that when this matter is

> considered in the Seventy-second Congress we may be able to pass a bill that will make it retroactive."

It may be urged that the decision not to make the amendment retroactive was motivated by the fact that the Court on the previous day had said, with respect to each of the three cases then decided, that there was "no question of the constitutional authority of the Congress to impose prospectively a tax with respect to transfers or trusts of the sort here involved . . ." (283 U. S. 783, 784). Such language certainly contained an implication that Congress might lack the power to impose such a tax on the corpus of trusts already created. More probably the decision not to make the amendment retroactive was motivated by the fact that those members of the Senate who were known to be hostile to federal estate taxation would, by stressing the unfairness of levying an estate tax on the corpus of trusts already created without intent to avoid the estate tax, be able to muster enough votes to prevent the passage of the resolution. Mr. Garner seems to have indicated as much when he said that the Committee on Ways and Means had not made the resolution retroactive because "we were afraid that the Senate would not agree to it" (74 CONG. REC. 7199, *supra*). When the resolution reached the Senate, two senators did take the occasion to voice their distaste for federal estate taxation generally (*id.* p. 7079).

But, regardless of the motive, it is clear that the House understood that the amendment would not affect trusts already created. After Mr. Garner's explanation as to the purpose and intent of the resolution, the following exchange took place (*id.* p. 7199):

> "Mr. La GUARDIA. This is to give timely notice that in the next Congress it will be made retroactive?

"Mr. GARNER. I have strong hopes that the next Congress will make it retroactive.

"Mr. BLACK. Was the Supreme Court decision based on a constitutional question, or a discussion of the statute?

"Mr. GARNER. It was on the statute itself, and was not constitutional."

Senator Smoot of the Committee on Finance had charge of the resolution on the floor of the Senate. He repeated *verbatim* the hereinabove quoted language of Mr. Hawley to the effect that (*id.* p. 7078)

> "... it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance, therefore, that this situation be corrected and that this obvious opportunity for tax avoidance be removed."

The resolution passed the Senate after a short discussion which gives no further enlightenment.

The hope expressed by Messrs. Garner and LaGuardia that a succeeding congress would enlarge the amendment by making it retroactive was never realized. While the wording of section 302(c) of the Revenue Act of 1926 as amended by section 803(a) of the Revenue Act of 1932 (47 Stat. 279; see Appendix A) was somewhat different from the wording of section 302(c) of the Revenue Act of 1926 as amended by the joint resolution, the changes were not significant. They indicate no intention to broaden the scope of the provisions now under consideration. In explaining the changes, both the House and the Senate committee reports said [1939-1 Cum. Bull. (Part 2) 490, 532]:

> "The purpose of this amendment to section 302(c) of the Revenue Act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect."

The reports then went on to explain such change.

The 1932 bill was presented in the House by Mr. Crisp who stated [75 CONG. REC. 7241 (1932)]:

> "The only retroactive provision in this bill is the one dealing with the valuation of estates, on account of the great drop in the price of securities."

On the clerk's reading of the bill there was little discussion. Mr. Crisp presented a last-minute amendment, the effect of which was to remove the conclusive presumption that gifts made within two years before death were made in contemplation of death (*id.* p. 7242). Other than that there is nothing to be found in the Congressional Record with respect to the 1932 amendment of section 302(c) of the Revenue Act of 1926.

There were no further amendments to section 302(c) of the Revenue Act of 1926. In 1939 it became section 811(c) of the Internal Revenue Code. Section 811(c) has since remained unchanged.

The Treasury, which had drawn the Joint Resolution of March 3, 1931, was well aware of its limited scope. On May 22, 1931, the Secretary of the Treasury approved T. D. 4314, X-1 Cum. Bull. 450 (1931), which set forth the language of the joint resolution and then said (p. 451):

"In view of the decisions of the Supreme Court of the United States in *Nichols* v. *Coolidge* (274 U. S., 531 [T. D. 4072, C. B. VI-2, 351]), *May* v. *Heiner* (281 U. S., 238 [Ct. D. 186, C. B. IX-1, 382]), *Coolidge* v. *Long* (282 U. S. 582), *Burnet* v. *Northern Trust Co.* (51 S. Ct., 342), *Edgar M. Morsman, Jr.* v. *Burnet* (51 S. Ct., 343) and *Cyrus H. McCormick* v. *Burnet* (51 S. Ct., 343), the portion added by the amendment to section 302(c) of the Revenue Act of 1926, as set forth above in italic, will, notwithstanding the provisions of section 302(h) of that Act, be applied *prospectively* only, i.e., to such transfers coming within the amendment as were made *after* 10.30 p.m., Washington, D. C., time, March 3, 1931.

"Regulations 70, 1929 edition, will be amended to make the changes necessitated by the amendment to section 302(c) of the Revenue Act of 1926 and the above decisions of the Supreme Court."

This, it is submitted, is a complete answer to petitioner's suggestion (Brief, p. 32) that the discussion on the floor of the House concerning retroactivity had reference to the taxation of estates of those who had already died rather than to the taxation of trusts which had already been created. The motive in passing the resolution, as Mr. Hawley had explained, was the fear that "many persons will proceed to execute trusts" (74 CONG. REC. 7198, *supra*). The Treasury well knew this, so it inserted a provision in T. D. 4314, *supra*, to make it plain that the Joint Resolution of March 3, 1931 would apply only to trusts made after March 3, 1931.

In pursuance of the promise contained in the last paragraph of T. D. 4314, *supra*, Article 18 of Regulations 70 (revised 1929) was amended on April 11, 1932, by T. D. 4336, XI-1 Cum. Bull. 329. Article 18 as so amended read:

"Art. 18. *Retention of possession, enjoyment, or income.*—Any transfer which was made by the decedent after 10.30 p. m. Washington, D. C. time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.

"Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the decedent retained one-half of the income, then one-half of the transferred property should be included."

It was two months later (June 6, 1932) that section 302(c) was amended by section 803(c) of the Revenue Act of 1932 (47 Stat. 169, 279). Evidently the Treasury saw nothing significant in the amendment in so far as gifts with reserved life estates were concerned, for it made no immediate attempt to change the regulation. But twenty-nine months after the passage of the Revenue Act of 1932 it seems to have concluded that the time was ripe to try to apply the statute retroactively. In view of what had been said in Congress when the March 3, 1931 Joint Resolution was adopted, however, the Treasury did not venture to go all the way. It went only part of the way by providing that if the trust was created before March 3, 1931 the corpus would not be taxed if the settlor died before June 6, 1932, the date of passage of the 1932 Act; but if the

settlor lived longer, the corpus would be taxed. Such was the substance of Article 18 of Regulations 80, approved November 7, 1934. The exact language of the article was as follows:

> "**Art. 18. Transfers with possession or enjoyment retained.**—(a) *Transfers included.*—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life. (See article 15.)
>
> "(b) *Taxability.*—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p. m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p. m., eastern standard time, June 6, 1932. (See section 506 of the Revenue Act of 1934.)"

Hassett v. *Welch*, 303 U. S. 303 (1938), was the test of the new thought, for there the decedents had established trusts with reserved life estates in 1930 and 1924 and had died, respectively, on June 4, 1933, and November 20, 1932. This Court reviewed the circumstances surrounding the enactments of March 3, 1931, and June 6, 1932 and concluded unanimously that Congress did not intend by either of those amendments to tax the corpus of trusts created before March 3, 1931.

The government urged that because section 302(h) of the 1926 Act [now section 811(h) of the Code] said that, except as otherwise specifically provided, the provisions of section 302 should apply to transfers whether made before or after February 26, 1926, the amendments of 1931 and 1932 were clearly intended to be retroactive. This Court held otherwise, saying (pp. 313-314):

> "It will be remembered that the Joint Resolution of 1931 amended § 302(c) of the Act of 1926 to cover transfers such as are here involved. It made no reference to any other portion of that Act. Since § 302(c) in its original form was, by § 302(h), made applicable to transfers whether made before or after the Act of 1926, the contention is that it has like operation and effect as respects the provision added to it by the amendment. And the same argument is advanced with respect to the amendment of subsection (c) by the Act of 1932.
>
> "Resort is had to canons of constructions as an aid in ascertaining the intent of the legislature. It may occur that the intent is so clear that no such resort should be indulged, and the Government claims this is such a case. The matter is, we think, involved in sufficient ambiguity to warrant our seeking such aid. A well-settled canon tends to support the position of respondents: 'Where one statute adopts the particular provisions of another by a specific and descriptive reference to the statute or provisions adopted, the effect is the same as though the statute or provisions adopted had been incorporated bodily into the adopting statute. . . . Such adoption takes the statute as it exists at the time of adoption and does not include subsequent additions or modifications of the statute so taken unless it does so by express intent.' The weight of authority holds this rule respecting two separate acts applicable where, as here, one section of a statute refers to another section which alone is amended.

"In view of other settled rules of statutory construction, which teach that a law is presumed, in the absence of clear expression to the contrary, to operate prospectively; that, if doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer, we feel bound to hold that the Joint Resolution of 1931 and § 803 (a) of the Act of 1932 apply only to transfers with reservation of life income made subsequent to the dates of their adoption respectively."

It is submitted that the Court could not properly have held otherwise in view of the expressed intent of Congress that the amendment of March 3, 1931 should not be applied retroactively.

As a result of this Court's decision in *Hassett* v. *Welch*, the Treasury, on October 24, 1938 by T. D. 4868, reworded Article 18 of the 1937 edition of Regulations 80 to read as follows (1938-2 Cum. Bull. 355):

"**Art. 18. Transfers with possession or enjoyment retained.**—Except in the case of a bona fide sale for an adequate and full consideration in money or money's worth, the gross estate embraces (section 302(c), as amended) all property transferred by the decedent, whether in trust or otherwise, if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—

"(1) At any time after 10.30 p.m., eastern standard time, March 3, 1931, and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or

"(2) At any time after 5 p.m., eastern standard time, June 6, 1932, and such retention or reserva-

tion is for any period mentioned in (1) or for any period not ascertainable without reference to his death.

A reservation for a 'period not ascertainable without reference to his death' may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

"The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

"If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate."

Except for clerical changes, the language of section 81.18 of the present Regulations 105 is identical. The Treasury apparently does not consider *Helvering* v. *Hallock*, 309 U. S. 106 (1940), to be a repudiation of *Hassett* v. *Welch*, 303 U. S. 303 (1938), for almost nine years have expired since that decision was rendered and there has been no change in the regulation. Moreover, it is only at the invitation of this Court that the Treasury is now urging that *Helvering* v. *Hallock* is controlling with respect to reserved life estates.

(c) *Helvering* v. *Hallock* should not be deemed to be a repudiation of *May* v. *Heiner* and *Hassett* v. *Welch*.

In *May* v. *Heiner* the Court decided that Congress did not intend to measure the estate tax by the corpus of an *inter vivos* trust merely because the settlor had reserved a life estate. In the three decisions of March 2, 1931 the Court unanimously reaffirmed its views in that respect. On March 3, 1931 Congress dealt with that specific situation. It changed the law as to trusts created in the future, but said that the amendment was not intended to apply to trusts already created. The hope was expressed by some that a later congress would further amend the law so as to apply it to trusts already created (74 Cong. Rec. 7199), but that was not done. It is therefore difficult to see how the present Court, without usurping the legislative function, can treat the statute as if the further amendment had been made. If it cannot properly do so without *Helvering* v. *Hallock*, it is difficult to see how anything said in that case could logically supply the lacking justification.

The amendment of March 3, 1931 dealt with a reserved life estate. *Helvering* v. *Hallock* dealt with an entirely different, albeit related, situation. The question in *Helvering* v. *Hallock* was whether an *inter vivos* gift of a remainder interest was complete when the donor had provided that if he survived another the corpus was to be returned to him. The Court in effect decided that such a gift of the corpus was not complete and never could be complete until the donor died. It was a gift intended to take effect in possession or enjoyment at or after death since none could say during the lifetime of the donor that another would surely receive it.

If the matter of a reserved life estate were one of first impression certain generalizations to be found in the opinion in *Helvering* v. *Hallock* might be urged as foreshadowing a

conclusion contrary to that reached in *May* v. *Heiner*. For example, this Court said (309 U. S. 106, 112):

> "The inescapable rationale of this decision, rendered by a unanimous Court [referring to *Klein* v. *United States*, 283 U. S. 231] was that the statute taxes not merely those interests which are deemed to pass at death according to refined technicalities of the law of property. It also taxes *inter vivos* transfers that are too much akin to testamentary dispositions not to be subjected to the same excise."

The petitioner might have quoted that language as authority for concluding that the law was, from the beginning, a combination of estate and inheritance tax. From that he could have argued that Congress intended to tax not only what passed from the decedent at death but also what others enjoyed because he had died. But inasmuch as the very court which decided *Klein* v. *United States*, 283 U. S. 231 (1931), had only five weeks earlier unanimously decided *Northern Trust Co., Morsman and McCormick* without any perception of inconsistency, such an argument lacks persuasive force.

Again, this Court said in *Hallock*, when referring to section 302(c) (p. 111):

> "The taxable event is a transfer *inter vivos*. But the measure of the tax is the value of the transferred property at the time when death brings it into enjoyment."

This generalization might also be used by the petitioner if the matter of a reserved life estate were one of first impression, for it too might be interpreted as meaning that section 302(c) is an inheritance tax statute rather than an estate tax statute. But here again the force of the argument is spent by *Klein* v. *United States*, for this Court in the next paragraph of its *Hallock*

decision recognizes that *Klein* is one of the cases that begot the difficulties. *Klein* was rightly decided. Yet the court which decided *Klein* decided *Northern Trust Co.*, *Morsman* and *McCormick*. To it there was nothing inconsistent.

Generalizations may usually be lifted from far-reaching opinions and, according to the will of him who lifts them, be expanded or contracted to apply to a particular case. That is their vice. It is respondent's position that a generalization ought not to be used to solve a question on which Congress has evidenced its intent by legislation.

It is not at all difficult for the Court to find a workable pattern without doing violence either to *Helvering* v. *Hallock* or to the Joint Resolution of March 3, 1931. *Helvering* v. *Hallock*, in the absence of corrective legislation, may be applied to cases where the donor consciously or unconsciously retains a real possibility of getting the corpus back. *Hassett* v. *Welch* may be applied to cases where the donor before March 3, 1931 irrevocably disposed of the corpus but retained an interest in the income. It is a workable pattern, though to some it may be illogical. It is entirely lawful for Congress to pursue a policy which taxes some trusts because they were set up after a certain date and fails to tax others because they were set up before such date.

Respondent draws considerable comfort from what was actually held in *Helvering* v. *Hallock*. It will be recalled that *Klein* v. *United States* was decided in 1931. The *St. Louis Union Trust* cases,* which appear to conflict with *Klein*, were decided only four years later. *Hallock*, which attempted to resolve the difficulty, was decided in 1940. The Court in *Hallock* was faced with inconsistent decisions rendered within

Helvering v. *St. Louis Union Trust Co.*, 296 U. S. 39 (1935), *Becker* v. *St. Louis Union Trust Co.*, 296 U. S. 48 (1935).

a relatively short space of time. It had to decide whether stare decisis required adherence to the later cases even though they appeared to be unsound. In resolving that problem the Court said (pp. 119-121):

> "We recognize that *stare decises* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decises* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.
>
> "Nor have we in the *St. Louis Trust* cases rules of decision around which, by the accretion of time and the response of affairs, substantial interests have established themselves. No such conjunction of circumstances requires perpetuation of what we must regard as the deviations of the *St. Louis Trust* decisions from the *Klein* doctrine. We have not before us interests created or maintained in reliance on those cases. We do not mean to imply that the inevitably empiric process of construing tax legislation should give rise to an estoppel against the responsible exercise of the judicial process. But it is a fact that in all the cases before us the settlements were made and the settlors died before the *St. Louis Trust* decisions.
>
> "Nor does want of specific Congressional repudiations of the *St. Louis Trust* cases serve as an implied instruction by Congress to us not to reconsider, in the light of new experience, whether those decisions, in conjunction with the *Klein* case, make for dissonance of doctrine. It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. To explain the cause of non-action by Congress when Congress

itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Trust* cases it had, even by any bill that found its way into a committee pigeon-hole. Congress may not have had its attention so directed for any number of reasons that may have moved the Treasury to stay its hand. But certainly such inaction by the Treasury can hardly operate as a controlling administrative practice, through acquiescence, tantamount to an estoppel barring reexamination, by this Court of distinctions which it had drawn. Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

Unlike *Hallock*, the Court here has no recent decision which conflicts with a sounder prior doctrine. The decisions are all in accord. The oldest (*May* v. *Heiner*) was rendered eighteen years ago; the youngest (*Hassett* v. *Welch*) eleven.

Unlike *Hallock*, the Court here has a rule of decision around which, by the accretion of time, substantial interests may have established themselves. Presumably many who had, without thought of estate tax avoidance, created trusts before 1931 with reserved life estates could have disposed of those life estates by irrevocable assignment had they not relied upon the expressed limited scope of the joint resolution and the recognition of that limit by this Court in *Hassett* v. *Welch*. Mr. Church was potentially of that group.

Unlike *Hallock*, the earlier decisions were not followed by silence on the part of Congress. Congress reacted promptly.

But when it did so, it expressed the intention that the change should not be retroactive.

Unlike *Hallock*, the earlier decisions involved in this case were not followed by Treasury inaction. It was the Treasury which asked Congress to change the law.

The tests which this Court applied in *Helvering* v. *Hallock* to demonstrate that stare decisis was not appropriate there indicate that stare decisis fits the instant situation like a glove.

Petitioner urges (Brief, pp. 45-48) that *May* v. *Heiner* may be repudiated without repudiating *Hassett* v. *Welch* because the latter dealt only with the retroactive application of the corrective legislation. This, however, is tantamount to saying that the Court, in *Hassett* v. *Welch*, was indulging in an intellectual exercise devoid of any practical application. If the Court which decided *Hassett* v. *Welch* did not deem *May* v. *Heiner* to be the law in the absence of corrective legislation, why should it have concerned itself with the question whether the joint resolution and subsequent statutes were retroactive?

Four Circuit Courts of Appeals, the Court of Claims and the Tax Court have said that *Hassett* v. *Welch* and *May* v. *Heiner* are still the law and that they were not overruled by *Hallock*. *Commissioner* v. *Singer's Estate*, 161 F. 2d 15, 17 (C. C. A. 2d, 1947); *Commissioner* v. *Kellogg*, 119 F. 2d 54, 56 (C. C. A. 3d, 1941); *Schultz* v. *United States*, 140 F. 2d 945, 948 (C. C. A. 8th, 1944); *United States* v. *Brown*, 134 F. 2d 372, 373 (C. C. A. 9th, 1943); *New York Trust Co.* v. *United States*, 51 F. Supp. 733, 735-736 (Ct. Cls., 1943); *Estate of James H. Matthews*, 3 T. C. 525, 539 (1944).

POINT 3.

UNDER SECTION 811(c) THE "POSSESSION AND ENJOYMENT" OF THE CORPUS OF AN *INTER VIVOS* TRUST IS NOT "INTENDED TO TAKE EFFECT * * * AT OR AFTER" THE SETTLOR'S DEATH, WHERE HE RESERVES TO HIMSELF A LIFE ESTATE AND NAMES HIMSELF AS CO-TRUSTEE WITH SUCH CONTROL AND ADMINISTRATIVE POWERS OVER THE CORPUS AND INCOME AS ARE HERE VESTED.

Question 6 couples the co-trusteeship with the postponement of enjoyment of the corpus. As already pointed out, Congress did not intend, by the Joint Resolution of March 3, 1931, that a trust created before that date should be taxed because the settlor had reserved a life estate. If that be granted, the question is whether the co-trusteeship is in itself fatal.

Question 6 seems to assume that the settlor has "broad control and administrative powers over the corpus and income" of the trust. If the question be directed to the Church trust, respondent submits that the assumption is not in accord with the evidence in the case.

There were three trustees designated in the instrument. One was the decedent. As a beneficiary of the trust he was entitled only to the income (R. 5). The other two trustees were brothers of the decedent. They were entitled to share in the corpus if, as actually happened, they survived the settlor and the settlor died without issue (R. 5). If they predeceased the settlor and he died without issue, their children took shares of the corpus (R. 5). Their interests and the interests of their children as potential remaindermen were thus in many respects adverse to the interest of the settlor as life beneficiary. In the absence of express provisions to the contrary in the trust

indenture, whatever discretionary powers the settlor had as trustee were under the law of New York exercisable only with the concurrence of his co-trustees. *Andrews* v. *Kirk*, 160 N. Y. Supp. 434 (not officially reported), aff'd 175 App. Div. 975 (1916), aff'd 221 N. Y. 641 (1917); *Fritz* v. *City Trust Co.*, 72 App. Div. 532 (1902), aff'd 173 N. Y. 622 (1903); *Matter of Amanda M. Johnson*, 123 Misc. 834 (Surr. Ct., Clinton County, N. Y., 1924); 3 Warren's Heaton on Surrogates' Courts 36-37 (6th Ed., 1941). The single exception to this rule of unanimity is where the trustees cannot agree on voting shares of stock held by the trust. In that event a majority of the trustees may vote the stock. New York Stock Corporation Law, sec. 48.

The trust powers were for the most part powers which are customarily granted to trustees,—to hold the original assets if the trustees wished to do so; to sell at public or private sale; to compromise claims; to exchange the trust securities in reorganizations; to vote the stock; and to employ counsel (R. 5-6). Such powers were required to effectuate the purposes of the trust and would have been implied if they had not been expressed. *Spencer* v. *Weber*, 163 N. Y. 493, 502 (1900); 3 Bogert on Trusts and Trustees (Part 1) 406-412 (1946); 2 Scott on Trusts, 982-986, 1025 (1939).

In addition, there were three powers which belonged exclusively to the settlor. The first was to prevent the sale of any of the securities constituting the trust (R. 5). The only securities that were ever in this trust were stock in Church & Dwight Co., Inc., but the reservation of the right to veto the sale of that stock really had no significance. Petitioner never indicated in his ninety-day letter, before the Tax Court or before either of the appellate courts that the retention of such a veto power was deemed by him to be significant. If, however, this Court thinks

it might be of some significance, respondent requests that the case be returned to the Tax Court to take additional evidence as to just how important such veto-power was under the circumstances. *Cf. United States* v. *Wyoming*, 331 U. S. 440, *supra*; *Hormel* v. *Helvering*, 312 U. S. 552, *supra*. Respondent is prepared to show that the amount of stock which the trust owned was never as great as one and one quarter per cent. of the outstanding stock of the company; that the decedent never owned any stock of the company except the stock which he placed in the trust; that the settlor was never an officer or director of Church & Dwight Co.; that he never concerned himself with the condition of the business of that company; and that he never executed a proxy to vote stock in that company. Some indication of the extent of the decedent's concern with company affairs may be gleaned from what is already in the record. When the company declared a stock dividend, it apparently forgot that he was a trustee and issued the new certificate only in the names of his two brothers as trustees (p. 15, typewritten transcript of record).

The second power retained exclusively by the settlor was to withhold approval of reinvestments which his co-trustees proposed to make (R. 5). But if he did this his co-trustees were nevertheless authorized to invest in "legals" without his consent (R. 5).

The only other power retained by the settlor was to designate a successor trustee if he or either of his brothers ceased to be a trustee (R. 6). He had no power to remove a trustee.

Under subdivision (6) of the trust instrument (R. 6) the trustees jointly had power to determine whether receipts, losses or administration expenses were allocable to income or principal "as the trustees may deem proper". Such clauses were frequently inserted to relieve trustees of the necessity of peti-

tioning for instructions in doubtful situations.* See Note, *Discretionary Income and Principal Clauses in Trust Instruments*, 50 Yale L. J. 1467 (1941). The language of subdivision (6) was without significance insofar as the settlor was concerned since he could not exercise it without the consent of his two brothers whose own interests were adverse to an invasion of principal. Furthermore under the rule in New York such discretionary power is not construed as a power to invade principal. *Matter of Talbot*, 170 Misc. 138, 143-144 (Surr. Ct., Orange County, 1939).

The unimportance of the powers retained by the settlor may be judged by his complete indifference to retaining any administrative powers at all. When the trust instrument was being drawn it was the attorney who suggested that Mr. Church should be one of the trustees and the settlor "had no suggestions to make, suggestions** as to the form of anything" (p. 34, typewritten transcript of record).

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, *supra*, the settlor reserved much broader powers. The trustee was required to follow his instructions in regard to the management, sale or investment of any part of the trust estate, to give the settlor proxies to vote the stock in the trust and to follow the settlor's written instructions with respect to any real estate in the trust. The settlor also had power, with the consent of

*For example, when the Church trust was created in 1924, the New York rule for allocating stock dividends between principal and income "had resulted in so many complications and obscurities as to be almost unworkable in practice. . . . It involved elaborate accounting for the purpose of determining how far the dividends were the result of profits accumulated before the creation of the trust, and how far the result of profits accumulated thereafter." *People* ex rel *Clark* v. *Gilchrist*, 243 N. Y. 173, 182 (1926). By c. 843 N. Y. Laws 1926, §17-a of the New York Personal Property Law was amended to clarify the situation.

**"just" in the original is obviously a stenographic error.

one of the beneficiaries, to alter, change or modify the terms of the trust. Mr. Church had no such broad powers. The settlor in the *Reinecke* case did have the right to appoint a successor trustee in the event of a vacancy, a power analogous to that reserved by Mr. Church. All the foregoing powers reserved to the settlor in the *Reinecke* case were urged by the petitioner as evidencing that the settlor there had for his lifetime retained complete dominion over the property. This Court rejected the contention, saying (pp. 346-347):

> "Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift *inter vivos* not subject to the tax."

Unless a trust is necessarily one intended to take effect in possession or enjoyment at or after death if the settlor designates himself as a co-trustee, the administrative control here reserved should not result in the taxability of the corpus. Congress has never evidenced any intent to go that far.

POINT 4.

THE TRANSFER IN QUESTION IS NOT SO MUCH "AKIN TO TESTAMENTARY DISPOSITIONS" AS TO MAKE IT SUBJECT TO THE ESTATE TAX STATUTES.

Question 8 assumes that when the trust was created "possession or enjoyment" of the trust properties passed to the beneficiaries because of certain "refined technicalities of the law of property" and, on that assumption, inquires whether transfers of that type would not be so much "akin to testamentary dispositions" as to make them subject to the estate tax statutes.

When this Court used the term "refined technicalities of the law of property" in its *Hallock* decision it was referring to the *Klein* case. And there was ample justification for the use of the term there inasmuch as the *St. Louis Union Trust* decisions, unlike *Klein*, had seemed to turn on the fact that others had the vested remainders in the corpus while the decedent had only contingent interests. Respondent does not believe, however, that the technicalities of the law of property influenced the decisions in *Nichols* v. *Coolidge*, *Reinecke* v. *Northern Trust Co.*, *May* v. *Heiner*, *Burnet* v. *Northern Trust Co.*, *Morsman* v. *Burnet* or *McCormick* v. *Burnet*. The determinative factor there was that Congress had said it was adopting an estate tax law, not an inheritance tax law. From that the Court reasoned that Congress did not intend to tax property transferred by a decedent during his lifetime unless such property had been given in contemplation of death. The determinative factor in *Hassett* v. *Welch* was that when Congress set out to change the law it said the change was intended to be prospective only.

Disregarding therefore any technical argument that possession and enjoyment passed when the trust was created; was the instant trust akin to a testamentary disposition?

If the retained life estate be the significant feature of the disposition, there is a similarity in that enjoyment by the donee was deferred until the death of the donor. There is a marked dissimilarity in that the donor had nothing left to give when he died.

If by question 8 this Court is referring to the fact that the settlor made himself a co-trustee, it is submitted that the term "akin" is clearly inappropriate. By creating the trust the decedent surrendered his dominion over the property to trustees a majority of whom had interests adverse to his own. Under a testamentary disposition he would have reserved complete dominion until his death.

If by "akin to testamentary dispositions" this Court is referring neither to the reserved life estate nor to the co-trusteeship, but rather to the assumed existence of a remote possibility of reverter, the answer is that an extremely remote possibility of reverter bears no resemblance to a testamentary disposition under which the decedent has kept everything to the date of his death.

POINT 5.

THE RULINGS OF *HELVERING* v. *CLIFFORD* HAVE NO EFFECT UPON THIS TRUST.

In *Helvering* v. *Clifford*, 309 U. S. 331 (1940) the settlor established a trust to last for five years unless he or his wife died sooner. On its termination the corpus reverted to the settlor. The net income during the period of the trust was to be paid to the wife or accumulated, as the settlor might see fit, but when

the trust terminated she was to get any income which had been accumulated. The settlor was the sole trustee. He was authorized to vote the stocks constituting the corpus of the trust. He had unrestricted power to sell, exchange, mortgage or pledge the securities and to reinvest. He could hold the trust property in his own name if he saw fit. The wife had substantial income of her own from other sources and was presumably not in need of what he might elect to give her from the trust income, although he did in fact give her all the income.

In requiring the husband to pay tax on the income of the trust, this Court said (p. 335-337):

> "In this case we cannot conclude as a matter of law that respondent ceased to be the owner of the corpus after the trust was created. Rather, the short duration of the trust, the fact that the wife was the beneficiary, and the retention of control over the corpus by respondent all lead irresistibly to the conclusion that respondent continued to be the owner for purposes of §22(a).
>
> "So far as his dominion and control were concerned it seems clear that the trust did not effect any substantial change. In substance his control over the corpus was in all essential respects the same after the trust was created as before. The wide powers which he retained included for all practical purposes most of the control which he as an individual would have. * * * It is hard to imagine that respondent felt himself the poorer after this trust had been executed or, if he did, that it had any rational foundation in fact. For as a result of the terms of the trust and the intimacy of the familial relationship respondent retained the substance of full enjoyment of all the rights which previously he had in the property. That might not be true if only strictly legal rights were considered. But when the benefits flowing to him indirectly through the wife are added to the legal rights

> he retained, the aggregate may be said to be a fair equivalent of what he previously had. * * * Thus, where, as in this case, the benefits directly or indirectly retained blend so imperceptibly with the normal concepts of full ownership, we cannot say that the triers of fact committed reversible error when they found that the husband was the owner of the corpus for the purposes of §22(a). To hold otherwise would be to treat the wife as a complete stranger; to let mere formalism obscure the normal consequences of family solidarity; and to force concepts of ownership to be fashioned out of legal niceties which may have little or no significance in such household arrangements."

Assuming that the tests which the Court applied in the *Clifford* case are appropriate to determine whether a trust shall be subjected to the estate tax,* there is little similarity between the two trusts. The *Clifford* trust was of "short duration". The Church trust was for life. In the *Clifford* trust the settlor retained almost unrestricted control over the corpus. In the Church trust the settlor surrendered the control over the corpus to trustees of whom a majority had interests adverse to his own. In the *Clifford* case the corpus belonged to the settlor. In the Church trust it would never belong to him. The *Clifford* trust involved merely a temporary reallocation of income while the Church trust involved, as its divestment feature, the permanent alienation of corpus. After he set up the trust, Mr. Church, unlike Mr. Clifford, could no longer deal with the property as he pleased. He had lost substantially all of the *indicia* and benefits of property ownership with respect to the corpus. It can scarcely be said, as in the *Clifford* case, that the benefits flowing to the settlor indirectly left an

*A point as to which even petitioner expresses considerable doubt (Pet's Br. p. 52).

aggregate which was "a fair equivalent of what he previously had." The facts here are the antithesis of the facts in the *Clifford* case.*

In the instant case the Tax Court's findings are the converse of its findings in the *Clifford* case. It has said that the settlor disposed of his interest in the corpus as well as any man could (R. 10).

POINT 6.

THE CIRCUIT COURT OF APPEALS SHOULD NOT BE REVERSED ON GROUNDS WHICH PETITIONER NEVER PRESENTED FOR ITS CONSIDERATION.

This Court has said that an appellant may not raise a point of law here which he failed to press before the lower court: *Helvering v. Cement Investors*, 316 U. S. 527, 535 (1942); *Helvering v. Wood*, 309 U. S. 344, 349 (1940); *Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937).

With the exception of the point raised by question 2, petitioner has not urged before either of the lower courts any of the points of law that are inherent in the questions propounded by this Court. At the trial, petitioner's counsel told the Tax Court:

> "Our position in brief is, that there is a possibility of reverter in this trust and that it falls within the rule of

*Even for income tax purposes the courts have consistently held the *Clifford* rulings inapplicable to trusts of the same general plan and scope as the Church trust (excepting, of course, Church's retention of the life interest) in spite of the settlor's reservation of much broader powers of administration and control than were here reserved by Mr. Church. *Kohnstamm* v. *Pedrick*, 153 F. 2d 506 (C. C. A. 2d, 1945); *Cushman* v. *Commissioner*, 153 F. 2d 510 (C. C. A. 2d, 1946); *Jones* v. *Norris*, 122 F. 2d 6 (C. C. A. 10th, 1941); *David L. Loew*, 5 T. C. 363 (1946); *Ernst Huber*, 6 T. C. 219 (1946); *Ronald K. Evans*, 5 T. C. M. 84 (1946).

Helvering vs. Hallock. [p. 4, typewritten transcript of record]

* * *

"In other words, there is no provision in the trust instrument specifically stating in the failure of issue, it shall come back to me, nor is there any provision stating that if there is no issue surviving me, it shall go to a charity or anything like that. It just provides a life estate and then for certain designated beneficiaries and then the trust instrument is silent. [*id.* p. 6]

* * *

"I know it has been contended by the petitioner that the doctrine of the Hallock case only applies where there is some express reservation in the trust instrument which says it shall revert back to the estate of the deceased.

"However, the Government's position is this and I think a certain line of cases is, that where there is no provision even in the trust instrument, that it shall specifically revert back to the estate of the deceased, why, under the rule of the Hallock case, it is includible in his estate." [*id.* pp. 6-7]

In his brief in the Tax Court, petitioner devoted less than three pages to a discussion of the law. The gist of his argument was set forth in the first paragraph of that discussion (pp. 4-5):

"There was no intent on the part of the decedent to divest himself of the ownership of the corpus. His one desire was to have an assured income and to satisfy his half-brother and keep the stock in the family. This his attorney endeavored to do by directing that the corpus go, in the event of decedent's death, to his children and their issue, if any, and in the alternative, to his brothers and sisters and their issue, if any. No provision required that the corpus should go to whoever

> might be entitled to inherit by law, but *designated in effect a class to receive the property*. Failure of the class would automatically require the return of the corpus to his estate." (Italics in original)

The petitioner then argued that *Helvering* v. *Hallock* was controlling and quoted from the language of the Court at page 112 of that decision. He then concluded (p. 6):

> "It is apparent that the transfers were incomplete in decedent's lifetime because full and complete dominion over the corpus of the trust was suspended by the contingencies of the remaindermen surviving the decedent."

Not a word about anything but the supposed possibility of reverter.

In the statement of points to be relied upon, which petitioner filed with the Circuit Court of Appeals pursuant to rule 75(d), there is no particularization as to anything but the possibility of reverter. In addition to objecting generally to the result reached by the Tax Court, the particularization reads as follows:

> "3. In failing to hold and decide that the interest of the beneficiaries designated in the trust instrument was contingent upon their survivorship of the decedent, and that the beneficiaries' interest in the said trust did not finally vest until at or after decedent's death.
>
> "4. In failing to hold and decide that decedent had a contingent remainder in the assets of said trust by operation of law and that he retained this reversionary interest until the date of his death."

In petitioner's briefs before the Circuit Court of Appeals there is no mention of *May* v. *Heiner* or of *Hassett* v. *Welch*, no hint that anything but the asserted reverter is involved. *Helvering* v. *Hallock* is mentioned, but only in conjunction

with such cases as *Fidelity Co.* v. *Rothensies*, 324 U. S. 108 (1945); *Commissioner* v. *Estate of Field*, 324 U. S. 113 (1945) and *Goldstone* v. *United States*, 325 U. S. 687 (1945). Those cases all dealt with the possibility that the donor might get the property back.

When respondent's counsel suggested at the oral argument before the court below that petitioner might be attacking *May* v. *Heiner* and *Hassett* v. *Welch* in a circuitous fashion, petitioner's counsel disclaimed any such intention. His disclaimer is the more convincing since he did not attack those cases in brief or on argument before this Court at October Term, 1947.

Petitioner's failure to raise the points is understandable. Even though he was prepared to invoke *Hallock* as authority for taxing the corpus if a fantastically remote possibility of reverter existed, he presumably did not feel that the rationale of that decision led to the repudiation of *May* v. *Heiner* and *Hassett* v. *Welch*. But if the rule against raising new points on appeal is to be disregarded in such circumstances, there is nothing left of it.

POINT 7.

THE CIRCUIT COURT OF APPEALS PROPERLY AFFIRMED INASMUCH AS THE TAX COURT MADE NO CLEAR-CUT MISTAKE OF LAW.

The *Dobson* doctrine was abolished as a rule of law as of September 1, 1948, by section 36 of the Act of June 25, 1948, Pub. L. No. 773, 80th Cong., 2d Sess. However, *Dobson* was the law when the Circuit Court of Appeals spoke.

In respondent's earlier brief it pointed out that the Tax Court made no clear-cut mistake of law when it found that the decedent had disposed of his interest in the corpus of the trust as well as any man could and that if a reverter existed

it was so remote as not to result in taxability. The applicability of *Dobson* to that feature of the case will not be elaborated here.

But the *Dobson* rule is just as applicable to the problems raised by the last seven of the questions posed by this Court. None could say with assurance in March, 1947, that *May* v. *Heiner* and *Hassett* v. *Welch* were no longer the law. Those courts which had occasion to consider the question felt that *Hallock* had not shaken the authority of those cases. *Commissioner* v. *Singer's Estate*, 161 F. 2d 15, 17, *supra*; *Commissioner* v. *Kellogg*, 119 F. 2d 54, 56, *supra*; *Schultz* v. *United States*, 140 F. 2d 945, 948, *supra*; *United States* v. *Brown*, 134 F. 2d 372, 373, *supra*; *New York Trust Co.* v. *United States*, 51 F. Supp. 733, 735-736, *supra*; *Estate of James H. Matthews*, 3 T. C. 525, 539, *supra*. And if the rationale of the *Clifford* case would, in this Court's opinion, result in including the Church trust in the decedent's gross estate, that result is so unforeseen that even now petitioner urges it with some hesitance (Brief pp. 52-54).

Conclusion

The judgment of the court below should be affirmed.

Respectfully submitted,

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New York, N. Y.
October 4, 1948.

APPENDIX A

The following is a compendium of the subsections of the federal estate tax laws relating to transfers intended to take effect in possession or enjoyment at or after death, from the first modern federal estate tax law in 1916 to the law in effect on the date of decedent's death in 1939.

To facilitate tracing the changes in the subsection, italics indicate new language not to be found in the subsection immediately prior to the respective enactments, and lines through the text indicate language omitted from the respective enactments which was in the subsection as it read immediately theretofore.

Revenue Act of 1916—39 Stat. 777—September 8, 1916.

SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

* * *

(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Revenue Act of 1917—39 Stat. 1000—March 3, 1917.

The Revenue Act of 1917 was amendatory only. No amendments to section 202(b) of the Revenue Act of 1916 were made.

Revenue Act of 1918—40 Stat. 1097—February 24, 1919.

Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has *at any time* created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (*whether such transfer or trust is made or created before or after the passage of this Act*), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Revenue Act of 1921—42 Stat. 278—November 23, 1921.

The Revenue Act of 1921 reenacted section 402(c) of the Revenue Act of 1918 without change.

Revenue Act of 1924—43 Stat. 304—June 2, 1924.

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of

or intended to take effect in possession or enjoyment at or after his death ~~whether such transfer or trust is made or created before or after the passage of this Act~~, except in case of a bona fide sale for a fair consideration in money or moneys worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of *Part I of* this title;

Revenue Act of 1926—44 Stat. 70—February 26, 1926.

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, *by trust or otherwise,* ~~or with respect to which he has at any time created a trust,~~ in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for ~~a fair~~ *and adequate and full* consideration in money or money's worth. *Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.* Any transfer of a material part of his property in the nature of a final

disposition or distribution thereof, made by the decedent within two years prior to his death *but prior to the enactment of this Act*, without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning ~~of Part I~~ of this title.

Revenue Act of 1928—45 Stat. 791—May 29, 1928.

The Revenue Act of 1928 was amendatory only. No amendments to section 302 (c) of the Revenue Act of 1926 were made.

Public Resolution No. 131—46 Stat. 1516—March 3, 1931.

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, *including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or

interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

Revenue Act of 1932—47 Stat. 279—June 6, 1932.

SEC. ~~302~~ 803. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, ~~including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom;~~ *or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom,* except in case of a bona fide sale for an adequate and full consideration in money or money's worth. ~~Where within~~

~~two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title.~~ Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death ~~but prior to the enactment of this Act~~ without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

Internal Revenue Code—53 Stat. 1—February 10, 1939.

There were no subsequent amendments to or reenactments of section 302(c) until the enactment of the Internal Revenue Code on February 10, 1939. Section 302(c) was reenacted as section 811(c) of the Code (53 Stat. 120) with insignificant changes including new catch-lines to accord with the general form of the Code. Section 811(c) reads as follows:

Sec. 811. *GROSS ESTATE.*

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, *except real property situated outside of the United States—*

* * *

(c) *TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH.*—To the extent of any in-

terest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for h life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this ~~title~~ *subchapter*;—

Code section 811(c) has never been amended. The decedent died on December 10, 1939, ten months after enactment of the Code.

APPENDIX B

The following is a compendium of the subsections of the United States Treasury Regulations relating to the estate tax in so far as applicable to *inter vivos* transfers subject to a reservation of income for life by the transferor, from the first regulation promulgated on this subject in 1919 to the regulation in effect on the date of decedent's death in 1939.

The first estate tax regulations were published in 1916 (U. S. Treas. Reg. 37). They contained no provision that a transfer *inter vivos* subject to a reservation of income for life by the transferor was a transfer intended to take effect in possession or enjoyment at or after his death. Nor did the 1917 revision of Regulation 37 contain any such provision. It appeared for the first time in the 1919 revision of Regulation 37.

To facilitate tracing the changes in the subsection italics indicate new language not to be found in the subsection immediately prior to the respective promulgations. Changes brought about by treasury decisions are indicated by brackets enclosing the affected part except where the change was so substantial as to warrant the reproduction of the amended subsection in its entirety. The text of the subsections pertaining to annuities has been omitted. Attention is also called to the fact that Regulations 63, 68 and 70 were, for a time, in effect concurrently as they were intended to apply respectively to the 1921, 1924 and 1926 Acts.

U. S. Treas. Reg. 37 (Revised 1919).

"Art. 24. RESERVATION OF INCOME.—A transfer is taxable where the grantor reserves to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment after the death of the grantor, and the value of the entire property should be included in the gross estate. Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross

estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. * * * A gift of the principal of a trust fund which takes effect at or after the decedent's death is taxable, although the income during the decent's life is payable to some one other than himself. Example: The decedent transfers property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable."

There was also a 1921 edition of Regulations 37 in which the passage quoted above remained unchanged.

U. S. Treas. Reg. 63 (1922).

[Matter in brackets was deleted on March 15, 1930, by T. D. 4283, IX-1 Cum. Bull. 366 (1930).]

"Art. 20. RESERVATION OF INCOME.—A transfer, *not amounting to a bona fide sale for a fair consideration in money or money's worth*, is taxable where the *decedent* reserved to himself during life the income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment *at* the death of the *decedent*, and the value of the entire property should be included in the gross estate. Where the *decedent* reserved a proportionate part of the income, only a corresponding proportion of the value of the property should be included in the gross estate. If, for example, he reserved one-half of the income, the value of one-half of the property transferred should be included in the gross estate. * * *

["A gift of the principal *intended to take* effect *either in possession or enjoyment* at or after the decedent's death is taxable, although the income during the decedent's life *was* payable to some one other than himself. Example: The decedent transferred property to his son, the latter agreeing to pay

the income to his mother during the decedent's life. The transfer to the son is taxable."]

U. S. Treas. Reg. 68 (1924).

[Matter in brackets was deleted on March 15, 1930, by T. D. 4284, IX-1 Cum. Bull. 358 (1930).]

"Reg. 68, Art. 18. RESERVATION OF INCOME OR AN ANNUITY.—A transfer, not amounting to a bona fide sale for a fair consideration in money or moneys worth, is taxable where the decedent reserved to himself during life the *entire* income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

"Where the decedent reserved *only a portion* of the income, only a corresponding proportion of the value of the property should be included in the gross estate, [*unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be.*] Thus, for example, if *the reservation was of* one-half of the income *then* one-half of the value of the transferred property should be included, *and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.*

* * *

"Where *in any case* the transfer was made in contemplation of death, the full value of the transferred property, as of the date of the decedent's death, should be included in the gross estate *whether or not the transfer was one intended to take effect in possession or enjoyment at or after death.*

"[*Where there was no reservation of income . . . but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus* a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable although the income . . . was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter agreeing to pay the income to his mother during the decedent's life. The transfer to the son is taxable."]

U. S. Treas. Reg. 70 (1926).

Reg. 70, Art. 18. RESERVATION OF INCOME OR AN ANNUITY.—A transfer, not amounting to a bona fide sale for *an adequate and full* consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

"Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property should be included in the gross estate, unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be. Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the prop-

erty should be postponed until at or after his death, then the value of the entire property should be included.

* * *

"Where in any case the transfer was made in contemplation of death, the value of the transferred property, as of the date of the decedent's death, should be included in the gross estate whether or not the transfer was one intended to take effect in possession or enjoyment at or after death. (See Art. 16)

"Where there was no reservation of income . . . but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income . . . was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter *to receive the income during the decedent's life*, or agreeing to pay the income to his mother during the decedent's life. The transfer to the son *in either case* is taxable."

U. S. Treas. Reg. 70 (Revised 1929).

[Matter in brackets deleted on March 15, 1930, by T. D. 4285, IX-1 Cum. Bull. 356 (1930).]

"Reg. 70, Art. 18. Reservation of income or an annuity.—A transfer, not amounting to a bona fide sale for an adequate and full consideration in money or money's worth, is taxable where the decedent reserved to himself during life the entire income of the property transferred. In such a case the transfer of the principal takes effect in possession and enjoyment at the death of the decedent, and the value of the entire property should be included in the gross estate.

"Where the decedent reserved only a portion of the income, only a corresponding proportion of the value of the property

should be included in the gross estate, [unless, however, the possession or enjoyment of the remaining portion of the transferred property, or a part thereof, was postponed until at or after the decedent's death, in which case there should also be included in the gross estate such remaining portion or part thereof, as the case may be.] Thus, for example, if the reservation was one-half of the income then one-half of the value of the transferred property should be included, [and if, in addition to such reservation, it was intended by the decedent that possession or enjoyment of the remaining portion of the property should be postponed until at or after his death, then the value of the entire property should be included.]

* * *

"Where in any case the transfer was made in contemplation of death, the value of the transferred property, as of the date of the decedent's death, should be included in the gross estate whether or not the transfer was one intended to take effect in possession or enjoyment at or after death. (See Art. 16)

["Where there was no reservation of income . . . but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable although the income . . . was payable during the decedent's life to some one other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable."]

Appendix B

U. S. Treas. Reg. 70 (Revised 1929), as amended by T. D. 4285, *supra*, as further amended on April 11, 1932, by T. D. 4386, XI-1 Cum. Bull. 329.

"Art. 18. *Retention of possession, enjoyment, or income.*—*Any transfer which was made by the decedent after 10.30 p.m., Washington, D. C., time, March 3, 1931, and under which he retained for his life or any period not ending before his death (1) the possession or enjoyment of, or the income from, the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom, is taxable, provided such transfer was not a bona fide sale for an adequate and full consideration in money or money's worth.*

"Where the decedent retained the possession or enjoyment of, or the income from, only a part of the property, or where he retained the right to designate the persons who shall possess or enjoy only a part of the property or of the income therefrom, only a corresponding proportion of the value of the property should be included in the gross estate. Thus, for example, if the *decedent retained* one-half of the income, then one-half of the transferred property should be included."

U. S. Treas. Reg. 80 (1934).

"Art. 18. *Transfers with possession or enjoyment retained.*—(a) *Transfers included.*—*The statutory phrase, 'a transfer . . . intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation by the decedent of the use, or the possession, or the rents or other income of the transferred property, or any part thereof, for his life, or for a period ascertainable only by reference to his death, or for a period of such duration as to evidence his intention to retain the enjoyment (in whole or in part) of the transferred property throughout his life.* (See article 15.)

"(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p.m., eastern standard time, March 3, 1931, *and (2) if the decedent died prior to* 5 p.m., *eastern standard time, June 6, 1932. (See section 506 of the Revenue Act of 1934.)"*

U. S. Treas. Reg. 80 (1934), as amended March 18, 1937, by T. D. 4729, 1937-1 Cum. Bull. 284, 285.

"Art. 18. Transfers with possession or enjoyment retained.—(a) Transfers included.—The statutory phrase, 'a transfer * * * intended to take effect in possession or enjoyment at or after his death,' includes a transfer, whether in trust or otherwise, made subject to the reservation *or retention* by the decedent of the use, or the possession, or the rents or other income *or enjoyment* of the transferred property, or any part thereof, for his life, or for a period *not* ascertainable without reference to his death, or for *such* a period as to evidence his intention *that it should extend at least for the duration of his life; including also the reservation or retention of the use, possession, rents, or other income the actual enjoyment of which, by the decedent, was to be postponed until the termination of a transferred precedent interest or estate.* (See article 15.)

"If for any such period the use, possession, rents or other income (in whole or in part) were to be disposed of in discharge of a legal obligation of the decedent or otherwise for his pecuniary benefit, then to that extent the use, possession, rents or other income will be treated as having been reserved to or retained by the decedent.

"(b) Taxability.—Every such transfer (not amounting to a bona fide sale for an adequate and full consideration in money or money's worth), made by the decedent subsequent to September 8, 1916, is taxable, and the value of the property or interest so transferred shall be included in the gross estate of the decedent. The provisions of this subdivision do not apply (1) if the transfer was made prior to 10.30 p.m., eastern standard time, March 3, 1931, and (2) if the decedent died prior to 5 p.m., eastern standard time, June 6, 1932. (See section 506 of the Revenue Act of 1934.)"

U. S. Treas. Reg. 80 (Revised 1937).

No change was made in the portion of Article 18 quoted above by the 1937 Revision of Regulations 80.

U. S. Treas. Reg. 80 (Revised 1937), as amended on October 24, 1938, by T. D. 4868, 1938-2 Cum. Bull. 355.

ART. 18. Transfers with possession or enjoyment retained.—*Except in the case of* a bona fide sale for an adequate and full consideration in money or money's worth, *the gross estate embraces (section 302(c), as amended) all property transferred by the decedent,* whether in trust or otherwise, *if he retained or reserved the use, possession, right to the income, or other enjoyment of the transferred property, and if the transfer was made—*

"*(1) At any time after* 10.30 p.m., eastern standard time, March 3, 1931, *and such retention or reservation is for his life, or for such a period as to evidence his intention that it should extend at least for the duration of his life and his death occurs before the expiration of such period; or*

"(2) *At any time after* 5 p.m., eastern standard time, June 6, 1932, *and such retention or reservation is for any period mentioned in (1) or for any period not ascertainable without reference to his death.*

Appendix B

A reservation for a 'period not ascertainable without reference to his death' may be illustrated by a reservation of the right to receive, in quarterly payments, the income of the transferred property where none of the income between the last quarterly payment and decedent's death was to be received by him or his estate; or by a reservation of a life estate following a precedent estate for life or a term of years.

"The use, possession, right to the income, or other enjoyment of the property, will be considered as having been retained by or reserved to the decedent to the extent that during any such period it is to be applied towards the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.

"If such retention or reservation is of a part only of the use, possession, income, or other enjoyment of the property, then only a corresponding proportion of the value of the property should be included in determining the value of the gross estate.

"(See article 15.)"

Article 18, U. S. Treas. Reg. 80 (Revised 1937), as set forth above was in effect when the decedent died on December 10, 1939. It is in effect today as section 81.18 of Regulations 105.

U. S. Treas. Reg. 105 (1942).

Although not promulgated until 1942, Regulations 105 were made applicable to the estates of decedents dying after February 10, 1939, the date of the enactment of the Internal Revenue Code. No change was made in Art. 18, U. S. Treas. Reg. 80 (revised 1937) except that it was redesignated as section 81.18 and statutory references were conformed with the new Code sections. The regulation remains unchanged today.